With very rare exceptions, the Supreme Court should not consider a petitioner's federal claim unless it was either expressly addressed by, or properly presented to, the state court that rendered the decision. *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998) (citations omitted). It is not disputed that Mr. Jones did not challenge Arkansas Code Ann. Section 26-35-705 in the trial court. His failure to challenge that statute, or to obtain any ruling as to the constitutionality of that statute, precludes further review in this Court. Jones' jurisdictional statement to the Arkansas Supreme Court makes no mention of the arguments he now makes to this Court. Joneses opening Brief and Addendum to Arkansas Supreme Court, at v (Jurisdictional Statement).

Arkansas Code Annotated Section 26-35-705 provides as follows:

> No later than July 1 of each year, the sheriff or collector shall be required to mail statements of taxes due by any taxpayer to the address provided by the taxpayer. In the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address.

Ark. Code Ann. Sec. 26-35-705 (1997). In short, this statute imposes upon a taxpayer a duty to safeguard his interests by ensuring that the taxing authorities have a valid mailing address. It is also part of a much larger statutory scheme.

A challenge to Section 26-35-705 is a predicate to making a successful Due Process challenge for lack of adequate notice of a right to redeem real property from the Commissioner for State Lands. In a series of cases, the Arkansas Supreme Court cited Section 26-35-705 in

turning back numerous Due Process challenges alleging inadequate constructive notice of sale of real property previously forfeit to the State of Arkansas. *See, Tsann Kuen Enterps. Co. v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003); *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003). Petitioner Jones, although apparently aware of these cases, failed to challenge Ark. Code Ann. Sec. 26-35-705 in the trial court because such a challenge was contrary to his other arguments.

In the courts below, Jones argued, repeatedly, and unsuccessfully, that his interest in the real property was a "homestead" interest of a resident homeowner. Consequently, Jones claimed below, he was entitled in 2003 to the protections of a revised statute that went into effect on January 1, 2004, for the protection of homestead interests in real property, Ark. Code Ann. Sec. 26-37-301 (2003) (amendment effective January 1, 2004). The amendment requires the Commissioner of State Lands to provide actual notice to owners of a homestead (and no others) by personal service of process at least sixty (60) days before the proposed sale. Petitioner Jones has abandoned this argument in this Court.

Jones further argued in the courts below, as his Complaint and Amended Complaint state, that his sole line of attack was that "actual" notice had to be provided to him as the homestead owner. It was not until Mr. Jones' receipt of the Land Commissioner's November 17, 2003, Supplemental Brief in Support of Commissioner's Motion for Summary Judgment, citing to *Dusenbery v. United States*, 534 U.S. 161 (2002), R. 32, that Jones changed his briefing, his argument, and his affidavit. Jones changed his assertions to state, for the first time, that he had not lived in the real property since 1993. JA 9-10.

Notwithstanding the sudden change in his affidavit and argument to the trial court, Petitioner Jones failed to amend his pleadings accordingly, although he had every right, and every opportunity, to do so. Ark. R. Civ. P. 15(a) ("party may amend his pleadings at any time without leave of court").

Within a very short time after Mr. Jones' new revelation that he had not lived at 717 N. Bryan since 1993, Respondents Flowers, on December 3, 2003, and Land Commissioner on December 9, 2003, promptly asserted that Mr. Jones had a statutory duty to notify the taxing authorities of his purported change of address, pursuant to Ark. Code Ann. Sec. 26-35-705. R. 81 (Flowers); R. 90 (Wilcox, Commissioner). In his only response to these legal arguments, Mr. Jones raised a challenge to another part of the statute (Section 26-37-202(e)), but failed to address the issue of Section 26-35-705 in the trial court. R. 135-138.

Moreover, Jones did not argue in the trial court that Respondent Commissioner had additional obligations to search telephone books, voter registration, and income tax records, notwithstanding Jones' failure to follow the law and protect his interests by filing a simple change of address notice. Consequently, on January 14, 2004, the trial court made its ruling, without any argument from Mr. Jones whatsoever concerning Section 26-35-705, without ruling on the applicability or constitutionality of Section 26-35-705, and without deciding the question presented by Petitioner in his appeal here. Pet. App. 12a.

The Arkansas Supreme Court noted that Jones had failed to make a predicate challenge to the applicable statute at issue, when it stated:

> The Joneses argue that the Commissioner should be required to search the public records or the phone book in order to ascertain the property owner's correct address. Again, this argument ignores the fact that section 26-35-705 requires the property owner to notify the tax collector of his correct address.

Pet. App. 10a. In other words, the Arkansas Supreme Court did not pass on the constitutionality of 26-35-705 because Jones failed to challenge that Section in the trial court. Jones' failure is otherwise inexplicable, given the series of Arkansas Supreme Court cases, over a period of years, indicating that 26-35-705 was of primary importance in its previous decisions.

This Court should assume that the Arkansas Supreme Court's failure to pass on this question was due to want of proper presentation by Mr. Jones in the state trial court. *Street v. New York*, 394 U.S. 576, 582 (1969); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983). Petitioner Jones has done nothing to show the contrary.

The Arkansas Supreme Court did not address the merits of an argument that Section 26-35-705 is unconstitutional for imposing an obligation on the taxpayer to notify the taxing authorities of a new address, because the trial court did not rule on the issue. Jones first raised this challenge, albeit obliquely, in his Brief to the Arkansas Supreme Court. Joneses opening Brief and Addendum to Arkansas Supreme Court, at 10. Mr. Jones' failure to obtain such a ruling in the trial court was a procedural bar to consideration of those issues, and constitutional issues related thereto, in the Arkansas Supreme Court. *Bell v. Bershers*, 351 Ark. 260, 92 S.W.3d 32, 37-38 (2002) (citing cases).

Mr. Jones' constitutional arguments concerning this statute had to be raised and fully developed in the trial court. *Raymond v. State*, 354 Ark. 157, 118 S.W.3d 567, 571 (2003). Development of a challenge to Section 26-35-705 was required in order to provide a record sufficient to demonstrate error of a federal constitutional dimension on appeal. *Tsann Kuen Enterps. Co. v. Campbell*, 355 Ark. 110, 129 S.W.3d 822 (2003); *Jones v. Double "D" Props., Inc.*, 352 Ark. 39, 98 S.W.3d 405 (2003). It is too late for Mr. Jones to argue that Due Process required Respondent Land Commissioner to provide more notices, or to undertake more research of phone, voter registration, and income tax records, above and beyond requirements of a statute Jones did not follow and did not challenge in any way in the trial court.

The Arkansas procedural rules, above, forbid the raising of federal questions at late stages in a case, and by any means other than presenting the issues to the trial court, making a complete record, and obtaining a ruling in the trial court in the first instance. These procedural rules are valid exercises of state power. *Williams v. Georgia*, 349 U.S. 375, 382-83 (1955); *Wainwright v. Sykes*, 433 U.S. 72, 81-87 (1977).

The Arkansas Supreme Court's long-held insistence on this procedural bar serves a legitimate state interest in having the trial court decide, in the first instance, all of the issues to be raised on appeal. It is important that the Arkansas trial court be given the first opportunity to consider the applicability of Section 26-35-705 in light of federal constitutional challenges, since the trial court might have construed the statute, as applied to the facts, in a way which saves its constitutionality. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). This is particularly so

where Mr. Jones revised the facts of his case, contradicted his own affidavit, and revised substantially the legal bases for his arguments, so many times.

This Court's only power over the Arkansas Supreme Court judgment is to correct it to the extent that it incorrectly adjudged federal rights properly presented, but not to revise the Arkansas Court's opinion. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Given the independent and adequate basis in state procedural rules that form the basis of the decision below, it is fair to say that the Arkansas Supreme Court could and would make the same judgment, albeit with a slightly different written opinion, after any "correction" urged by Petitioner Jones. Consequently, this Court's decision would be nothing more than an advisory opinion. *Id.*; *Paschall v. Christie-Stewart, Inc.*, 414 U.S. 100, 101-102 (1973). This Court should not exercise its powers in this case.

Petitioner's failure to raise the constitutionality of Section 26-35-705 in the trial court is also highly prejudicial to Respondents. As a consequence of Jones' failure, the record below is inadequate to address the factual and legal issues surrounding the application of Section 26-35-705 to the facts of this case, as Jones now construes them. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Jones' failure is particularly prejudicial to Respondents where the applicable constitutional "rule" is a rule of reasonableness under all the circumstances. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). It is impossible to argue the adequacy of Respondent Land Commissioner's actions – or proported failures to act – when Jones failed to develop a sufficient record on the matter at trial below.

Jones' failure to address Section 26-35-705 precluded Respondents from clarifying any factual ambiguities, including any ambiguities or uncertainties in the Lah Affidavit, JA 11-14, which could have been corrected in the trial court. Respondents may have been better able to flesh out the meaning, import, context, and extent of the "extensive pre-sale research on the Joneses' property" which Jones admitted in his opening Brief and Addendum to Arkansas Supreme Court, at 9. Respondents might also have better presented an explication of the handwritten notations on Exhibit 9 to the Lah Affidavit, which indicated next to the "notice information" to "send 1 cert. 1 reg. mail." R.75. Respondents might also have been able to present to the trial court the nature of the complex and expensive task it would be to locate the correct "Gary Jones" in the Little Rock telephone directory.

The Arkansas Supreme Court treats every act of the Arkansas legislature with a strong presumption of constitutionality. *Barclay v. First Paris Holding Co.*, 344 Ark. 711, 42 S.W.3d 496 (2001). The burden is on Jones to prove the unconstitutionality of a state statute. *Id.* Petitioner's failure to challenge Section 26-35-705 in the trial court is his waiver of any challenge to that statute on appeal.

Likewise, Jones' failure to challenge Section 26-35-705 precludes his argument that his "ability" to take steps to safeguard his interests does not relieve the state of its obligations to provide Due Process. Petitioner's Brief at 16. Contrary to Petitioner's assertions, *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 793 n.2 (1983), does not decide this issue, but left the question open. Section 26-35-705 does not simply provide Jones with the "ability to take steps to safeguard" his interests. Section 26-35-705 requires

Jones to take steps to protect himself, as part of the statutory scheme, and in order to qualify for the protections of the statute. *Mennonite* said nothing about such a statutory requirement. 462 U.S. at 793 n.2. There is no discussion of this in the proceedings below precisely because Mr. Jones failed to raise and develop this issue.

The constitutionality of Section 26-35-705 was not an issue at all in the trial court and was not once explicitly cited by Petitioner in his three briefs to the Arkansas Supreme Court. Accordingly, the issue of the constitutionality of Sec. 26-35-705 is not preserved for review in the United States Supreme Court because it was not preserved for review in the Arkansas Supreme Court. *Bell v. Bershers*, 351 Ark. 260, 92 S.W.3d 32, 37-38 (2002) (citing cases); Pet. App. 4a. The consequence is that there is an independent and adequate basis in state law to decide the issue, which this Court should not overturn.

RESPONDENT COMMISSIONER OF STATE LANDS

Respondent Flowers further agrees with the Brief to be submitted by Respondent Wilcox, Commissioner of State Lands for the State of Arkansas.

CONCLUSION

Because Mr. Jones failed to make a predicate challenge to Ark. Code Ann. Section 26-35-705 in the trial court, the writ of certiorari was improvidently granted; the writ of certiorari should be withdrawn; Jones should be

denied any of the relief he seeks; and the appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GARY KENT JONES,

Petitioner,

v.

LINDA K. FLOWERS AND MARK WILCOX,
COMMISSIONER OF STATE LANDS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires a State to take additional measures to locate an alternative address for a real property owner who has failed to pay taxes for four years where the State has twice sent notice by certified mail to the property owner's last known address, enacted a statutory requirement that a real property owner keep the tax collector apprised of any change in address, and provided notice by publication in a local newspaper after the mailed notices were returned unclaimed.

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STATUTORY PROVISION INVOLVED

In addition to the Fourteenth Amendment of the United States Constitution cited by petitioner, this case involves § 26-37-301 of the Arkansas Code Annotated, set forth in Addendum A to this brief, and § 26-35-705 of the Arkansas Code Annotated which provides in pertinent part:

> In the event that the address of the taxpayer changes, the taxpayer has an obligation to furnish the correct address.

INTRODUCTION

In 1967, petitioner Gary Kent Jones ("Jones") purchased real property located at 717 North Bryan Street, in Little Rock, Arkansas. He lived there with his wife until 1993, when he moved into an apartment; his wife continued to live at 717 North Bryan Street. Jones continued to pay real property taxes on that property through 1996, but failed to remit taxes for the years 1997, 1998, 1999, and 2000.

Pursuant to Arkansas law, when Jones moved, he had an "obligation to furnish the correct address" so that the tax collector could notify Jones of the taxes due on his property. Ark. Code Ann. § 26-35-705. Jones failed to do so. As a result, the Commissioner of State Lands ("Commissioner") notified Jones by certified mail at the address of the property (where Jones' wife continued to reside) that he was delinquent and had a right to redeem the property. That notice and a subsequent notice via certified mail were returned as "unclaimed." The Commissioner followed up these mailings with a notice of public sale published in the local newspaper. The question presented here is whether these actions – the provision of notice by certified mail, the enactment of a legal requirement obligating a taxpayer who changes his or her address to provide the tax collector with the correct address, and a follow-up notification by publication – satisfy the requirements of due process prior to

the sale of property for failure to pay real property taxes over a number of years.

Arkansas' statutory notice regime satisfies due process. Due process does not require that a real property owner receive actual notice before he or she loses that property for failure to pay taxes. *Dusenbery* v. *United States*, 534 U.S. 161 (2003). It requires only "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In numerous cases, this Court has made clear that regular mail is a constitutionally adequate means of delivering notice to persons whose addresses are known. See *infra* at 14. Arkansas' law requires notice by certified mail, exceeding that minimum requirement. In addition, Arkansas seeks to ensure the reliability of its mailed notices by imposing a specific legal obligation to notify the tax collector of any change in address for purposes of tax collection. This is clearly a scheme "reasonably calculated" to provide notice of a potential deprivation.

Jones, however, is dissatisfied with Arkansas' provision only of notice reasonably calculated to apprise parties of a deprivation. Instead, Jones argues that the State must assume additional duties to ascertain the property owner's address if the letter is not claimed. He couches the issue in terms of the Commissioner *knowing that the notice was not mailed to the property owner's address*. That precise question, however, is not presented here because all that the Commissioner knew was that the mail was "unclaimed," and all that means is that the residents of the property chose not to come to the post office to claim the registered mail sent to the address on file as Jones' place of residence. The Commissioner did not know that Jones had moved.

In any event, this Court has not and should not constitutionalize a requirement that constitutionally-

reasonable notice be followed by additional measures if the government learns information that casts doubt on whether actual notice was received. This would place a substantial burden on tax collection agencies which receive thousands or tens of thousands of returned mailings every year. Tax collection is a matter of fundamental significance to the State. Indeed, "the power to tax is basic to the power of the State to exist," and "[t]he States' interest in the integrity of their own processes is of particular moment respecting questions of state taxation." *Arkansas* v. *Farm Credit Servs.*, 520 U.S. 821, 826 (1997) (citing *Wisconsin* v. *J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). Its costs would increase exponentially, and it would be both be delayed and impaired under Jones' proposed construction of the Due Process Clause.

Further, Jones' expansive conception of due process would involve this Court in formulating and micromanaging State governments' policies respecting the extent of the follow-up required for mailed notices "reasonably calculated" to apprise property owners of a deprivation, but returned as undeliverable for any number of reasons.

Finally, even if the Due Process Clause requires States to take follow-up measures after learning that an initial constitutional notice may not have been received, the follow-up measures that the State mandates were plainly sufficient in this setting. The Commissioner published notice of the sale in the local newspaper. To be sure, publication is no longer constitutionally sufficient by itself to satisfy due process, but it is an acceptable follow up measure, particularly where, as here, the property owner has failed to pay *any* real property taxes for many years. "The owner of property whose taxes, duly assessed, have remained unpaid for more than one year must be held to the knowledge that proceedings for sale are liable to be begun." *Longyear* v. *Tollan*, 209 U.S. 414, 418 (1908).

STATEMENT OF THE CASE

1. As noted, petitioner Jones purchased property located at 717 North Bryan Street, Little Rock, Arkansas, 72205, in 1967. Joint Appendix ("JA") 9. Jones lived there with his wife until 1993 when he and his wife separated, and he moved into an apartment. *Id.* at 10. His wife remained in the home.[1] Although he claimed in state court that the property is his homestead, Jones has not lived at 717 North Bryan Street since 1993.[2] *Id.* at 9-10; Pet. App. 2a. And, although he had a legal obligation to do so, see Ark. Code Ann. § 26-35-705, Jones failed to inform the Pulaski County Collector of his new address. In 1997, Jones stopped paying taxes on the property; he did not pay any taxes on the Bryan Street property for 1997, 1998, 1999, and 2000. Pet. App. 2a.

Three years later, in early 2000, Pulaski County certified that the property was delinquent in its taxes to respondent Commissioner of State Lands, State of Arkansas. JA 12.[3] In early 2000, pursuant to Arkansas law, see Ark. Code Ann. § 26-37-301, the Commissioner sent Jones a Petition to Redeem addressed to the North Bryan Street property. JA 12. The certified mailing contained notice of the delinquency, instructions for redemption, and information regarding the

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[1] Although Jones and his wife separated, they did not divorce during the time relevant to this case. And, at all times relevant here, Mrs. Jones resided at the property. Nothing in the record indicates that Mrs. Jones is, or ever has been, an owner of the property.

[2] Arkansas defines "homestead" as a "dwelling that is used as [a person's] principal place of residence." Ark. Code Ann. § 26-26-1122(a); *see also Black's Law Dictionary* 660 (5th ed. 1979). Jones admits that he has not lived at 717 Bryan Street since 1993. JA 9-10.

[3] Under the statutory time frame, once a property becomes delinquent, the taxpayer has a minimum of a year and several months to pay the delinquency, and two years to redeem the property. In addition there is a thirty-day period to redeem the property after a public sale, and a further period if the property does not sell at the public sale. *See* Ark. Code Ann. §§ 27-37-101, 26-37-307(b), 26-37-202.